MAR 20 1925
WM. R. STANSBURY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 998.

MEYER SELZMAN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA,

MOTION FOR SUPERSEDEAS AND BAIL AND BRIEF IN SUPPORT THEREOF, WITH NOTICE AND PROOF OF SERVICE.

J. C. BREITENSTEIN,
G. J. PILLIOD,
Counsel for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 998.

MEYER SELZMAN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.
DEFENDANT IN ERROR.

NOTICE.

The defendant in error herein is hereby notified that the plaintiff in error will, on Monday, the 23d day of March, 1925, at the opening of the court on that day, or as soon thereafter as counsel can be heard, submit a motion for an order directing that writ of error may be made a supersedeas, and that plaintiff in error be released on bail in the sum of $5,000.00 pending the final disposition of said writ of error,

to the Supreme Court of the United States in its court-room, at the Capitol, in the city of Washington, D. C.

J. C. BREITENSTEIN,
G. J. PILLIOD,
Attorneys for Plaintiff in Error.

The foregoing notice is hereby accepted and delivery of a copy thereof and of the motion are hereby acknowledged.

JAMES M. BECK,
H.,
Solicitor General,
Attorney for the United States of America.

IN THE SUPREME COURT OF THE UNITED STATES.

MEYER SELZMAN, *Plaintiff in Error,*

vs.

THE UNITED STATES OF AMERICA, *Defendant in Error.*

MOTION FOR AN ORDER DIRECTING THAT WRIT OF ERROR MAY BE MADE A SUPERSEDEAS AND THAT PLAINTIFF IN ERROR BE RELEASED ON BAIL IN THE SUM OF $5,000 PENDING THE FINAL DISPOSITION OF SAID WRIT OF ERROR.

Now comes Meyer Selzman, by Joseph C. Breitenstein and Gerard J. Pilliod, his counsel, and moves this honorable court for an order directing that the writ of error to the District Court of the United States for the Northern District of Ohio, Western Division, at Toledo, Ohio, pending in this honorable court under the provisions of Section 238 of the Judicial Code of the United States, may be made a supersedeas, and that plaintiff in error be released on bail in the sum of five thousand ($5,000.00) dollars pending the final disposition of said writ of error, it appearing in the transcript of the record and a memorandum opinion of Hon. John M. Killits, United States District Judge for the Northern District of Ohio, Western Division, attached hereto and made a part hereof, that the District Court of the United States for the Northern District of Ohio, Western Division, at Toledo, Ohio, has refused to admit convict to bail and upon supersedeas pending proceedings in error in this court.

J. C. BREITENSTEIN,
G. J. PILLIOD,
Attorneys for Plaintiff in Error.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

Criminal, Nos. 4172 and 4206.

THE UNITED STATES OF AMERICA, *Plaintiff*,

against

MEYER SELZMAN ET ALS., *Defendants*.

MEMORANDUM.

KILLITS, *J.*:

In passing on certain motions in these cases the court expressed its views there raised in a memorandum filed October 27, 1924. In the first case the defendant was sentenced to the penitentiary for violation of Section 37 of the Criminal Code, conspiracy; in the second case, he was sentenced to several terms, to be consecutively served in a workhouse, service to commence at the expiration of the penitentiary sentence imposed in cause 4172.

In the first case the alleged conspiracy consisted of an agreement to violate a regulation respecting the sale of denatured alcohol. In the second case, while raising the same question as to the jurisdiction of Congress to authorize regulations governing the sale of tax-paid alcohol for industrial purposes, the additional point is made, and overruled by the court, that Congress was without power to include in the National Prohibition Act a penalty for the sale of denatured alcohol for beverage purposes.

The cases were tried together. The evidence against the defendant was clear and conclusive, hardly open to dispute. Practically the only defense was the denial of the defendant of criminal intent, which was met by a superabundance of proof to the contrary. The defendant was promptly sentenced, but, on account of a domestic situation, execution of the sentence was suspended until the first of April by the consent of the United States, through the District Attorney, the convict being enlarged on bail to expire with March 31, 1925. We are now asked to admit convict to bail and upon supersedeas pending proceedings in error in the Supreme Court of the United States. This we have declined to do. As the court said in the opinion of October 27, the contentions to be submitted for review seem to be extremely fanciful. As to the first case, No. 4172, involving imprisonment in the penitentiary, we are unable to see any ground for argument at all. The second case involves some measure of construction of the National Prohibition Act. Whatever prospect of successful issue to the convict in the Supreme Court there is in the whole record seems to this court to abide in a consideration of the second case, 4206. Whatever relief convict will get from the judgment of this court will come in that case if at all. The term of imprisonment imposed in the first case affords ample time in its service for a presentation and a determination of the questions in the second case by the Supreme Court.

We therefore have declined to enlarge the convict pending proceedings in error.

JOHN M. KILLITS,
Judge.

JANUARY 19, 1925.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

I, B. C. Miller, clerk of the District Court of the United States within and for said district, do hereby certify the foregoing to be a true copy of the memorandum of court filed in the above-entitled cause in said court, and that the same is correctly copied from the original now on file in my office.

Witness my official signature and the seal of said court, at Toledo, in said district, this 23d day of January, A. D. 1925, and in the 149th year of the Independence of the United States of America.

[SEAL.]

B. C. MILLER,
Clerk,
By H. A. WATKINS,
Deputy Clerk.

ARGUMENT.

The issue referred to by the District Court at Toledo is, briefly, as follows:

The defendant was a registered pharmacist and was indicted and convicted under the provisions of Section 37, Criminal Code, for conspiracy to violate the provisions of certain regulations prescribed by the Commissioner of Internal Revenue and relating to the denaturation of alcohol, which provided in substance:

1. That alcohol might be denatured under Government supervision at the distillery and after payment of the tax.

2. That thereafter it might be sold at retail, tax free, provided a specified label was affixed.

It is contended that the taxing power of the Government, as created by statute, extended to the alcohol only until denatured; that after denaturation it went out into the country free from any Government supervision or authority; that the Commissioner no longer had power or control over it within the scope of the statute from which his pretended authority is claimed; that, therefore, the regulations had not the force and effect of law and no conspiracy to violate such provisions could be maintained.

It is not claimed that the authority of the Commissioner was derived from any of the provisions of the Volstead Act, and the regulations in question have no relation to that Act.

A statute exists in Ohio governing the sale of denatured alcohol at retail.

It was said by this court, in Hudson *vs.* Parker, 156 U. S., page 285:

> "Statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo punishment or imprisonment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error."

It is not urged here that the defendant is entitled to bail as a matter of right after conviction. The tenor of the decision seems to be that the benefit of doubt should be given to the plaintiff in error with a view to avoiding every possibility of his suffering a period of imprisonment upon a conviction subsequently reversed. In accordance with this principle the discretion of the trial judge should be exercised with the greatest care.

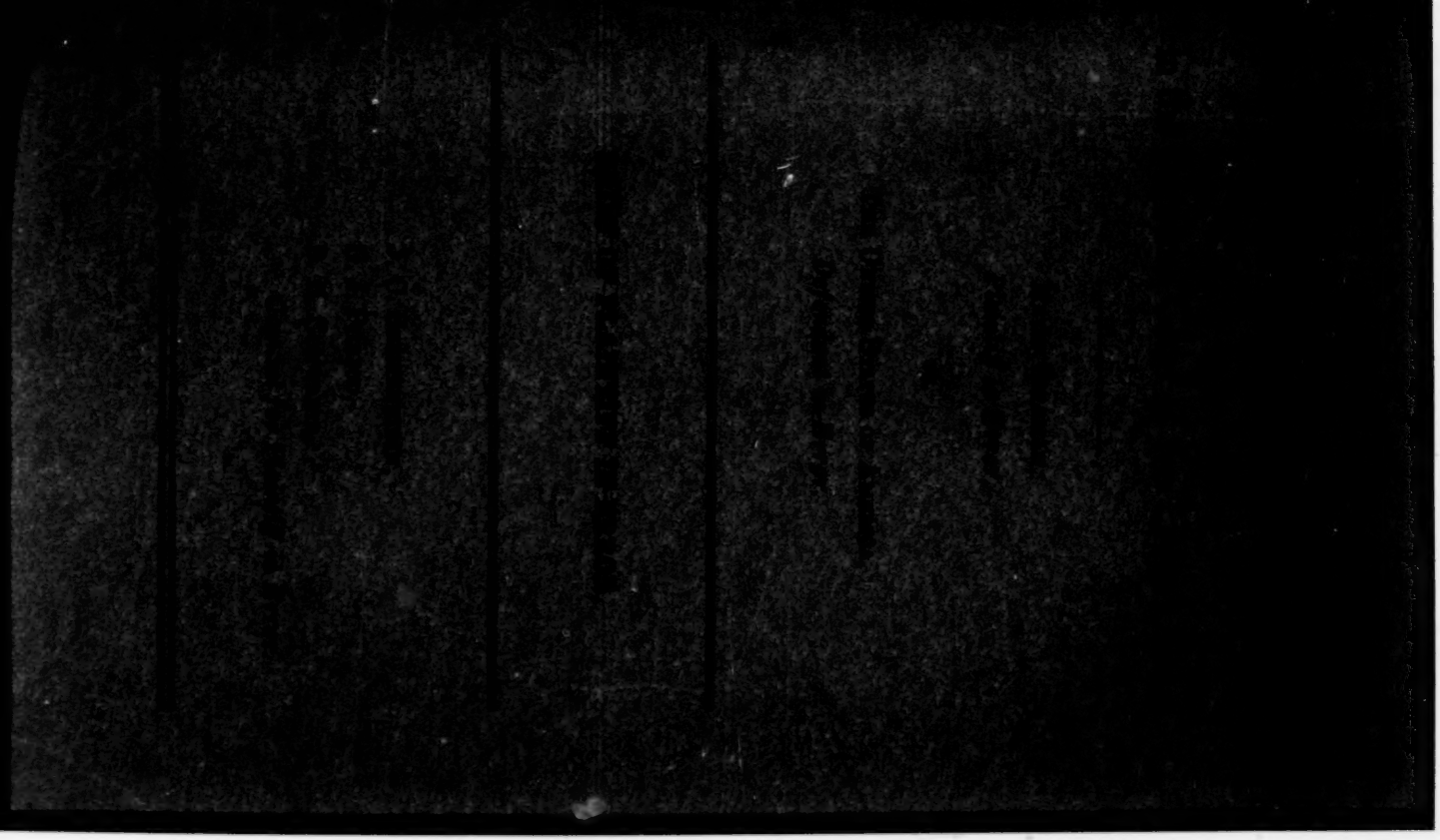
The plaintiff in error is a young man 25 years of age, with a wife and child dependent upon him for support.

The issues raised by the writ of error are neither frivolous nor fanciful, and there is enough prospect of success to warrant the temporary enlargement of plaintiff in error. Counsel ought to be permitted to say that they have been unofficially informed by a number of prominent pharmacists in the State of Ohio that a decision of this question would be welcome to the members of their profession.

Respectfully submitted,

J. C. BREITENSTEIN.
G. J. PILLIOD.

[Endorsed:] File No. 30,963. Supreme Court U. S. October Term, 1924. Term No. 998. Meyer Selzman, plaintiff in error, *vs.* The United States of America. Motion for supersedeas and bail, notice, and proof of service. Filed March 20, 1925.



In the Supreme Court of the United States

MEYER SELZMAN,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

FACTS.

The plaintiff in error was convicted of a series of violations of Section IV of the National Prohibition Act, and of Section 37 of the Criminal Code. He was sentenced upon each of these offenses, the terms to run consecutively.

The pertinent portion of Section IV reads as follows:

> "Any person who shall knowingly sell any of the articles mentioned in Paragraph 'a' 'b' 'c' and 'd' of this Section for beverage purposes * * * or who shall sell any of the same under circumstances from which the seller might reasonably deduce the intention of the purchaser to use them for such purposes * * * shall be subject to the penalties provided in Section 29 of this title."

The offenses charged were a series of unlawful sales of completely denatured alcohol, as defined in Paragraph "a" of Section IV, as follows:

> "Denatured alcohol, or denatured rum, produced and used as provided by laws and regulations, now or hereafter in force."

The offense referred to under Section 37, Criminal Code, is defined in Article 108 of Regulations 61, of the Commissioner of Internal Revenue, the pertinent section reading as follows:

> "Every package of completely denatured alcohol containing less than five wine gallons, sold or offered for sale by denaturers or dealers, must have affixed thereto a label on which must be printed in plain legible letters, red on white, the words, 'Completely denatured alcohol,' and, in addition on the same label, there shall be printed in large letters, in red ink, under the skull and bone symbol, the word 'poison,' together with the following statement: 'Completely denatured alcohol is a violent poison; it cannot be applied externally to human or animal tissues, without serious injurious results; it cannot be taken internally without inducing blindness and general physical decay, ultimately resulting in death.' * * * No other extraneous matter will be permitted thereon without the express authority of the Commissioner of Internal Revenue."

The contentions are made, first—That the provisions of Section IV as quoted are not properly within the purview of the Eighteenth Amendment, and are inconsistent with and repugnant to the provisions of the Volstead Act defining intoxicating liquor, because completely denatured alcohol is not a beverage, being, from its poisonous nature, unfit for beverage purposes.

Second—That Section 108 of Regulations 61 is not lawfully made within the statutory authority of the Commissioner, and that such section constitutes, not merely an administrative provision, but is, in effect, additional legislation by the Commissioner.

The questions were raised by demurrer and by motion to arrest judgment, as appears in the Record.

ARGUMENT.

I.

The Eighteenth Amendment provides in Section I:

"After one year from the ratification of this Article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States, and all territories subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited."

In Section II:

"The Congress and the several States shall have concurrent power to enforce this Article by appropriate legislation."

The Volstead Act, Section I, provides:

"When used in Title II and Title III of this Act, the word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of one per centum or more of alcohol by volume, which are fit for use for beverage purposes."

Congress derived its power to legislate on the subject of intoxicating liquor from the Amendment, but the term "intoxicating liquor," not safely left to judicial interpretation, presented a problem of definition. Perhaps never before has Congress explicitly defined the meaning of an Amendment. But in this instance, so closely allied is the enforcement act with the amendment that definitions of "intoxicating liquor" become in effect a part of the amendment.

"The phrase 'intoxicating liquor' is of supreme importance in the Eighteenth Amendment; without it, nothing else matters."

Judge Evans, *Ortel vs. Gregory*, 274 Federal at Page 794.

In fixing the intoxicating ingredient at one-half of one per cent., Congress departed far from accepted facts. That it had power to do so, no one doubts, but it insured a rational enforcement within the meaning and purport of the Amendment as directed at the beverage traffic by including, within the definition, only compounds fit for use for beverage purposes. This definition was intended by Congress to be complete and exclusive of all substances not specifically mentioned or classified therein. So its form indicates, conclusively, for it proceeds from a specific denomination of alcohol, brandy, etc., to the broadest conceivable classification of liquor, liquids and compounds * * * which are fit for use for beverage purposes.

Surely, there can be no question regarding the concluding phrase. It implies a test thoroughly consonant with the spirit and letter of the amendment, and to admit into the law a compound, admittedly unfit for beverage purposes, upon the theory that the definition is merely inclusive, is not only to disregard or supplement an incomplete category, but to evade a general qualification, or condition, imposed by Congress, which, by its very nature, must be complete and exclusive.

The general purport of the law is again emphasized by the provisions of Section IV, exempting from the provisions of the Act

"(a) Denatured alcohol, produced and used, etc. * * *"

The penal provisions of Section IV, of which plaintiff in error stands convicted, are in effect isolated enactments, apart from the lawful tenor of the Act, and outside the authority of Congress as derived from the Amendment to enact appropriate legislation.

Now, it may be contended that the amendment does not contain the words "fit for use for beverage purposes," but prohibits the manufacture, sale, etc., of intoxicating liquor for "beverage purposes," and that, therefore, the grant of power is broader than Congress chose to exercise in the act, that a poisonous liquor or compound, if intoxicating, and sold for beverage purposes, would be within the purview of the amendment, but intoxicating liquor, as defined by Congress, is intoxicating liquor referred to in the amendment, so that the amendment must be held to prohibit the manufacture, sale, etc., of intoxicating liquor (fit for use for beverage purposes) for beverage purposes.

It was urged in the Court's memorandum that the amendment and the statute strike at a practice and not at a thing, and that Congress, governed only by this broad principle, is not constricted in its legislation within the definition of things which are properly beverages or fit for use for beverage purposes. The amendment undoubtedly relates both to a practice and a thing; it could not do otherwise, because the amendment and the enforcement act strike at the beverage traffic in liquor, which in its last analysis, was a practice having to do with a certain thing, intoxicating beverage liquor. To attempt to legally separate one from the other is not to define but to dismember the amendment and statute.

A reasonable view would necessarily define that practice to relate to the traffic in intoxicating beverages for beverage purposes. Can it rationally be supposed

to relate to traffic in any liquid, which, though admittedly unfit for use for beverage purposes, might cause intoxication? Such an interpretation would bring us to the view that Congress could include within its legislature such chemicals as tincture of ginger, which, diluted, might be used as an intoxicant, as exemplified in *Bertrand vs. State*, 73 Miss. 51, 18 S. 545, and the term "intoxicating liquor" instead of being beverage liquor, as contemplated in the amendment, would be synonymous with liquid, as in the State of Washington, under the local statute.

The word "beverage" as used in the Eighteenth Amendment, is employed in its ordinary meaning of a liquid for drinking. *Falstaff Corporation vs. Allen*, 278 Federal, 643.

Indeed, a plenary grant of power to legislate on this subject was received by Congress,—*Rhode Island vs. Palmer*, 253 U. S. 350: *Falstaff Corporation vs. Allen*, 278 Federal, 643: *Piel vs. Day*, 278 Fed. 223, and the Courts have no power to review the discretion of Congress necessary and appropriate to enforce the provisions of the amendment, *Street vs. Lincoln Safe Deposit Company*, 267 Fed. 706, unless the enactment has no substantial relation to the enforcement of constitutional prohibition. *U. S. vs. Freund*, 290 Fed. 411-412.

But if the purpose of the amendment is confined to acknowledged beverages, or compounds, etc., fit for use for beverage purposes, then the right in Congress to exercise police power, under Section 2 of the Amendment, coming as it must from the Amendment only, can be no broader than the Amendment, and can relate only to intoxicating liquor as contemplated by the Amendment, and defined in the statute, unless the Amendment be construed to be a general grant of police power co-extensive

with that formerly inherent in the States only, or as possessed by Congress in the District of Columbia.

> "Police power is the power inherent in a government to enact laws within constitutional limits, to promote the order, safety, health, moral and general welfare of society."
>
> *C. J. Constitutional Law.*

If the general police power of the States is limited and restricted by constitutional provisions, surely it would follow reasonably that a grant of police power to Congress in the Eighteenth Amendment should be limited by the tenor and purpose of the Amendment, and not be extended to the sale of poisonous liquids.

II.

Title III of the Volstead Act relates to industrial alcohol. Provision for the use of alcohol in the art and industries had been made before the advent of the Eighteenth Amendment by the Acts of June 7th, 1906, the amendatory act of March 2, 1907 and sub-section II Paragraph "N" of Section IV of the Act of October 3rd, 1913, all of which may be found quoted as a preface in Regulation 61 of the Treasury Department. These statutes make provision for the withdrawal of alcohol for denaturation, free from the tax imposed on alcohol when used for beverage purposes.

Title III of the Volstead Act was enacted in order to preserve the purpose of and supplement these statutes in view of the situation developed by the Eighteenth Amendment.

Section V of Title III provides that tax is attached to the alcohol as soon as it is in existence as such and affects the collection of all taxes due the government

before denaturation takes place and before the denatured product leaves the distillery for general distribution, as unfit for use as an intoxicating beverage.

Section XV of Title III provides penalties for a violation of the Title or "of the regulations lawfully made thereunder."

Elaborate regulations have been promulgated by the Treasury Department, known as Regulations 60 and 61. Regulation 61 relates exclusively to industrial alcohol, and Article 108, pertinent to this issue, has already been quoted. Only if this be a lawful regulation within the scope of the Commissioner's power, as derived from Title III of the Statute, may it properly be, as a matter of law, an offense contemplated by Section 37 of the Criminal Code.

That Congress may empower departmental officers to promulgate regulations, having the force of law, to effectuate its own legislation, is uncontested.

> "From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations."
>
> *U. S. vs. Grimaud,* 220 U. S. 507.

But this power is subject to restriction. The regulations must be administrative of and not additive to the statute. *U. S. vs. Anti-Kamnia Company,* 231 U. S. at Page 666, 58 L. Ed., 419. In this case, in speaking of the functions of the Secretary of the Treasury, Secretary of Agriculture, and the Secretary of Commerce and Labor, who were empowered by the Food and Drugs Act to make certain regulations for its enforcement, the Supreme Court said:

> "It is undoubtedly one of regulation only, an administrative power, not a power to alter or add to the act."

The lawfulness of departmental regulations is to be tested by their relevancy to and restrictions within the tenor, meaning and purport of the act which authorizes them,—*U. S. vs. George,* 228 U. S., 14, 22, 33; 57 L. Ed. 712, and, with reference to the Volstead Act, no officer has a right to exercise authority, or to promulgate rules and regulations except as they have basis in the original Prohibition Act. *Fiedler vs. Moss,* 287 Fed. 934. *Ortel Company vs. Gregory,* 270 Fed. 789.

We contend that Article 108 is not within these principles and does not meet the requirements of this test.

The Volstead Act is a bifurcated statute, Title II, concerned with beverage liquors, deriving its authority from the Eighteenth Amendment only, Title III, concerned with industrial non-beverage compounds, deriving its authority chiefly from the general taxing power of Congress, it being the purpose of Title III to exempt alcohol under certain conditions from the effect of the amendment and the provisions of the Volstead Act, in deference to the needs of industry and the arts. If we had not the amendment, Congress would have no power with reference to alcohol, beverage, or non-beverage, except from the taxing power, and with the amendment it retains control from both sources while it remains fit for beverage purposes, and from the taxing power, only after denaturation renders it unfit for such purposes. Such is our view of this statute.

It must be borne in mind that Title II, Section IV, third paragraph, provides specific offenses with reference to denatured alcohol. Assuming that such provisions come within the scope of the amendment, the unlawful sales specified in this section may not be added to by the regulations, and this seems to be the expressed intention

of Section IV, Title II, which exempts, from the operation of the act, "denatured alcohol produced and used as provided by laws and regulations now or hereafter in force," no reference being made to sales except in the subsequent paragraph of Section IV, Title II, defining unlawful sales, already quoted, so that the effect of Article 108 of Regulations 61 is to make it an offense to sell completely denatured alcohol without affixing the prescribed label, and it is immaterial whether or not such sale be for beverage purposes or, under circumstances from which the seller might reasonably deduce the intention of the purchaser, to use them for such purposes (Section IV, Title II).

Now, is this an administrative act, or is it additive to the statute? We contend it constitutes legislation by the Commissioner, because the Commissioner, promulgating regulations under Title III, and we suppose there can be no question that he derives his authority from that title only, cannot, directly or indirectly, in effect, add to the offenses defined and specified in Title II, but that he is confined to the purpose and spirit of Title III, which does not relate to beverage alcohol and its manufacture and distribution as such.

But it may be urged that the legislative basis of this regulation is not in the amendment or in Title II but in the taxing power of Congress, and the regulation is administrative of that power, and of the statutes enacted under it, including Title III.

How far can the taxing power be extended?

> "Alcohol, lawfully denatured, may, under regulations, be sold free of tax, either for domestic use or for export."
>
> *Volstead Act, Title III, Section 10.*

What is the significance of this Section with reference to Article 108, Regulations 61, as applied to a druggist who makes retail sales in small quantities, (less than five wine gallons). Counsel have diligently searched the Revenue Laws and Regulations and can find no provision for the payment of the tax on such sales of completely denatured alcohol, with or without a label, or under any circumstances, so that the provision is nothing more than a permission having no force of law. If a sale of completely denatured alcohol occurs, without the affixed poison label, what tax law has been violated? For comparison, if narcotics are sold in violation of the Harrison Act, (Act of July 17, 1914, c. 10—38 Statutes, L. 277), the offense is related directly to an obligation to pay a tax as a dealer in narcotics, and the constitutional authority of the government, with reference to such an offense, has been established, *U. S. vs. Doremus,* 249 U. S. 86, 63 L. Ed. 282, but no such relationship exists here between the amendment or the statute, and Article 108, Regulations 61, which has no legislative basis, either in the amendment or in Title II of the Volstead Act, and none in Title III of that Act, except in the bare permissive provision of Section 10, Title III, which we submit is without force of law. Article 108 of Regulations 61 defines an offense solely within the police power of the States and of the provisions of Section 12708-3, which is identical in its provisions with Article 108, Regulations 61.

Respectfully submitted,

J. C. Breitenstein,
G. J. Pilliod,
B. H. Schwartz,
Counsel for Plaintiff in Error.